IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 528 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

BUDHSINH JIVATSINH CHAUHAN & 2 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR NN PRAJAPATI for Appellant(s) : 2 - 3.
MR.BHATE, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 01/10/2007
ORAL JUDGMENT

Heard Mr.Prajapati, learned Advocate for the appellants and Mr.Bhate, learned A.P.P. for the respondent-State.

2. The appellants have challenged the legality

and validity of the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No.13 of 1990 on 30th May, 1993. The appellants have been charged and tried for the offence punishable under Sections 302 read with Section 114 of the Indian Penal Code wherein at the end of trial, the learned Judge has hold the appellants No.1 to 3 guilty for the charge of offence punishable under Section 324 of the Indian Penal Code and sentenced them to undergo one year imprisonment and to pay a fine of Rs.1,000/- each and in default of making payment of fine, to undergo six months imprisonment. Whereas, the learned Judge has acquitted the original accused No.4 from the charges levelled against him.

3. Both the learned Advocate for the parties have taken this Court through the oral as well as documentary evidence led by prosecution at the time of trial. Mr.Prajapati has also taken this Court through the various grounds of challenge as mentioned in the memo of appeal.

4. The basic facts of the prosecution has been stated in paragraph 2.1 of the memo of appeal. It will be beneficiary to reproduce the same herein after.

> “2.1 The accused as well as the deceased-Udesinh Prabhatsinh were the residents of village Balanpura, Tal.Savli, Dist: Vadodara. They had their fields on the outskirts of village Balanapura. There was a dispute regarding cactus hedge which separated the fields of the accused as well as the deceased. On 3/7/1989 the widow of deceased Udesinh i.e. Santaben had gone to the field carrying water with her. It was about 10 O'clock in the morning. When she reached the field, she saw the present accused beating her husband. They were armed with weapons like Dharia, crow-bar and a stick. According to Santaben Udesinh, the appellant Nos.1 had dharia. Whereas the appellants Nos.2 and 3 had crow-bar and stick respectively. The blows were being delivered on the head of the deceased. According to Shantaben, the deceased fell down on the floor shouting for help. On hearing the shouts one Kesarsinh Dipsinh came to the spot and on seeing him all the accused had run away from the place. A complaint was lodged in respect of the incident with Savli Police Station and thereafter investigation was carried out. On completion of the investigation, the charge-

sheet came to be filed and accused were accordingly charge and tried.”

5. It is submitted by Mr.Prajapati, learned Advocate for the appellants that accused persons were on bail through out the trial and also at present they are enjoying the bail and therefore dismissal of the appeal would compel them to go to prison. So, this Court may reduce the punishment to the period already undergone because they have stayed for some days in custody as they were arrested for the charge of murder punishable under Section 302 of the Indian Penal Code. It is also submitted that the appellant No.1 has expired on 26th August, 1998 and appellants No.2 and 3 have settled in their lives. Therefore, the Court may even think to grant them the benefit of Probation of Offenders Act, as they have been acquitted from the serious charge of offence punishable under Section 302 of the Indian Penal Code.

6. There is a strong resistance from the learned A.P.P., who appears for the respondent-State. According to him, the learned trial Judge has imposed

very light punishment otherwise, one man has lost his life in a small event that had occurred in the agricultural field. The terms were also not inimical between them. The deceased was unarmed and P.W.No.2-Jalambhai Gotabhai, who was called by the deceased-Udesinh to give advise for resolving the dispute of boundary. This P.W.No.2 narrated the incident and role that was played by all the accused persons. The Court should also look to the injuries found on the body of the person of deceased. As such there is no appeal filed by the respondent-State against the order of acquittal recorded by the learned trial Judge qua offence punishable under Section 302 of the Indian Penal Code, because the blow given by the accused even could have been held them guilty for more severe charge punishable under Section 304 (I) or 304 (II) of the Indian Penal Code. Even, in the present case, the learned trial Judge could have imposed severe punishment holding them guilty of the charge of offence punishable under Section 326 of the Indian Penal Code and in that situation, the benefit of Probation of Offenders Act may be given and the order of conviction may be upheld.

7. On careful reading of two important witnesses, who have been examined to prove the substratum of the story of prosecution have been believed by the learned trial Court, are P.W.No.1-Shantaben Udesinh (Exh.9) and P.W.No.2-Jalambhai Gotabhai (Exh.12). There are no material contradictions or improvements in the depositions of these witnesses. While resolving the dispute of boundary between the field of accused No.1 and deceased, accused No.1 got excited on giving abuses by deceased-Udesinh and therefore the deceased was assaulted by the accused.

7.1 The evidence P.W.No.2-Jalamsinh Gotabhai gets direction corroboration from the inquest Panchnama as well as deposition of Prosecution Witness No.5-Dr.Kamal Bhattacharya, who has been examined at Exh.13. Of course, the complainant has admitted that as such there was no inimical terms between the deceased and the accused persons, but some hot exchange of words must have taken place and the deceased thereafter was assaulted by the accused

persons. While appreciating the evidence, the Court has considered the role played by each of the accused persons and therefore only the original accused No.4 came to be exonerated from the charge.

7.2 The postmortem note (Exh.14) shows that the deceased had sustained five injuries. They are mentioned in Column No.17 of the note. Out of total injuries, five injuries were incised wounds and they were on the vital part of the body. The temperoparietal region was found fractured and there was another fracture below the left ear of the size of 3 x 1 C.M., meaning thereby, the force of the blows given by the accused, must be heavy.

7.3 Prosecution Witness No.5-Shamatsinh Dahyabhai Parmar, who has been examined at Exh.16 has proved the Panchnama Exh.17 but evidence of this witness is found formal in nature and not useful. Prosecution Witnesses No.6, 7 and 8 have been declared hostile but the evidence of this hostile witnesses does not go to the root of the validity of the judgment and order of conviction and sentence

because they were examined to prove the discovery Panchnama of muddamal weapon. These discovery Panchnamas also cannot be said to have been proved which requires to be proved strictly as per the scheme of Section 27 of the Indian Evidence Act. But, there is no reason to disbelieve the version of Investigating Officer and the learned trial Judge has rightly accepted that recovery of the weapon has been genuinely proved by the prosecution through the Police Witnesses on the clue given by the accused. The weapons recovered were sent for analysis to F.S.L. and the Dharia-sickle used by one of the accused was also found stained with blood and the serological examination report shows that the same was stained with the blood group of 'B'. Blood stains found on the clothes of the deceased as well as the earth collected from the spot of the incident shows the presence of blood group 'B'.

7.4 In such a situation, it will be difficult for the Court to accept the say of Mr.Prajapati that the prosecution has not satisfactorily proved the incident. Ultimately, in absence of evidence to link

the accused with the offence punishable under Sections 302 or 326 of the Indian Penal Code, the learned trial Judge has decided to held them guilty of the charge of offence punishable under Section 324 of the Indian Penal Code.

8. The Court is not convinced that this is a case where the accused could have been given benefit of doubt. It is not necessary to reevaluate the entire set of evidence when the Court is inclined to accept the reasons assigned by the learned trial Judge. So, adopting the reasons assigned by the learned trial Judge and in view of the discussion made herein above, the present appeal requires to be and is according dismissed.

9. There is no reference in the operative portion of the judgment and order of conviction and sentence that the accused should undergo rigorous or simple imprisonment for one year, so also, the type of in default punishment. So, in absence of such clarifications, this Court is inclined to say that appellants No.2 and 3-original accused Nos.2 and 3,

if is asked to undergo the one year simple imprisonment, it would meet the ends of justice. Because, the appellants now shall have to undergo imprisonment after about lapse of about 15 years from the date of order of conviction and sentence.

10. In the result, the present Criminal Appeal is hereby dismissed so far as original accused Nos.2 and 3 are concerned. Whereas, as the original accused No.1 has expired, the appeal against him is treated abated.

10.1 The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No.13 of 1990 on 30th May, 1992 is hereby confirmed, so far as the appellants No.2 and 3 are concerned.

10.2 As the appellants No.2 and 3 shall have to go to prison after about fifteen years, some reasonable time should be given to surrender themselves before the concerned trial Court. The appellants No.2 and 3 is given eight (08) weeks time (upto 26th November, 2007) to surrender before the concerned trial Court, failing which the trial Court

shall issue non-bailable Warrant to secure the presence of appellants No.2 and 3 so that they can be sent to Jail to serve the sentence as imposed by the learned trial Court. Bail Bond of the appellants Nos.2 and 3 shall stand discharged.

(C.K.BUCH, J.)

sompura